85-1694

Supreme Court, U.S.
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CLERK

SUPREME COURT OF THE UNITED STATES

CASE NO._____

October 1985 Term

LOUIE L. WAINWRIGHT,
Secretary, Florida Department
of Corrections,
Petitioner,

v.

WILLIE WESLEY HORACE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER UNDER FLORIDA LAW IT IS NECESSARY TO CONDUCT A FORMAL COMPETENCY HEARING IN ORDER TO AFFORD AN ACCUSED DUE PROCESS OR IF A DETERMINATION OF COMPETENCY MADE BY THE TRIAL COURT ON WRITTEN REPORTS SATISFIES DUE PROCESS.

II

WHETHER THE UNITED STATES ELEVENTH CIRCUIT COURT OF APPEAL'S FINDING THAT THE PROCEDURAL DEFAULT DOCTRINE DID NOT APPLY TO THE RESPONDENT'S WAIVER OF COMPETENCY HEARING AND FAILURE TO RAISE ISSUE OF HIS COMPETENCY ON DIRECT APPEAL CONFLICTS WITH THIS COURT'S DECISION IN WAINWRIGHT V. SYKES, 433 U.S. 72 53 L.ED. 2D 594 1977 AND ENGLE V. ISAAC, 456 U.S. 107 71 L.ED. 2D 783 1982.

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PREFACE

The Petitioner, the State of Florida, was the Respondent-Appellee in the United States Court of Appeals for the Eleventh Circuit. The Respondent, Willie Wesley Horace, was the Petitioner-Appellant in the United States Court of Appeals for the Eleventh Circuit. In this brief, the parties will be referred to as they appear before this court. The following reference is made in this brief: a. For the portions of the record below sufficient to show jurisdiction in this court, which are contained in petitioner's appendix and consist of pages A1-A88.

OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals was rendered on February 14, 1986. It is not yet reported, but is reproduced in the state's Appendix at (A 1 - A 88). The order of the United States

District Court for the Middle District of Florida denying the Respondent's motion for a writ of habeas corpus rendered on March 29, 1985, (Amended April 4, 1985), is unreported, but reproduced at A 33. The United State's Magistrate's Report and Recommendation is reproduced at A 48.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit was rendered on February 14, 1986. The jurisdicition of this Honorable Court is invoked pursuant to the specific provision of Title 28 U.S.C. § 1254(1).

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

Section one of the Fourteenth Amendment to the United States Constitution commonly referred to as the due process clause provides as follows:

All persons born or naturalized

in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or inforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

Taken from Eleventh Circuit Court Opinion

On August 5, 1950, Horace was duly adjudged to be incompetent and was committed to the Florida State Hospital by a county judge for Leon County, Florida, pursuant to 394.20 Florida Statutes 1940. In December 1953, Horace escaped from the institution. Horace's formal adjudication of incompetency remained in effect at all times material hereto. (Fact contested by Petitioner).

Subsequently, on March 14, 1955, Horace was convicted on pleas of guilty to three charges, and was sentenced to thirty years imprisonment. These convictions were reversed by the Florida Supreme Court by an opinion which contained the following language:

> Respondent recognizes the rule of our cases holding that a person adjudged to be insane is presumed to remain in that condition until it is shown that

> sanity has returned. While the presumption raised by the adjudciation is not conclusive, the effect of the decisions is that it must be recognized unless and until it is overcome by contrary finding or proof that at a particular time the party previously adjudged incompetent was in fact of sound mind. In the situation at bar, the rule clearly requires that the judgments and sentences imposed against petitioner, as well as his plea to the charges against him, be vacated and set aside.

111 So. Rptr. 2d 670, 671 1959 footnote omitted.

Upon remand, upon receipt of a report from a doctor appointed to determine Horace's sanity, November 11, 1959, the court ordered Horace "readmitted to Florida State Hospital for a period of three to six months to more accurately determine [his' mental status.]" On August 1, 1960, the court entered an order indicating that the examination had been completed "and that [Horace] is not considered psychotic." The next record available reflects that on

September 26, 1960, Horace was convicted by a petit jury of breaking and entering and received a five year sentence with credit for time served.

In 1965, Horace was charged with robbery in Alachua County, Florida. On September 24, 1965, the Honorable James C. Atkins, Jr. appointed the public defender and the information was read to Horace. No penalties were mentioned. Appointed counsel entered a plea of not guilty and not guilty by reason of insanity. Medical doctors, Josh D. Davis and Henry L. Lyons, were appointed by the court to examine Horace. On December 6, 1965, a different public defender appeared before a different judge and copies of the doctors' reports were handed to the judge. Dr. Lyons' letter states that it was his "impression" that Horace was competent at the time of the act and "competent now" and able to

cooperate with counsel in his defense. The report of Dr. Davis states that "Horace has a personality disorder which is essentially of no consequence to the court" and it was his "impression that Horace [was malingering] in contrast to being psychotic or insane." Dr. Daivis's report contains no specific findings as to competency at the time of the act or competency to stand trial.

Then at the hearing, defense counsel stated: "The defendant is going to waive this sanity hearing at this time and announce his competency to be tried." The judge found Horace competent to stand trial based on the two reports and the public defender's statement. The judge said: "Whether he was crazy when he did it would be a question for the jury, I would assume. Or insane." (sic)

On January 7, 1966, the parties

appeared before the trial court. Thereupon, defense counsel moved to withdraw the plea of not guilty and not guilty by reason of insanity and entered a plea of guilty. The judge asked counsel if he "discussed this matter with the defendant and the nature of the charge and all the necessary elements." Counsel responded: "Yes, Your Honor, and I have had the case thoroughly investigated." The court then asked Horace his age and counsel made a one sentence statement in mitigation referring to Horace's "long history of mental disturbance." The judge asked who the victim was. The court then adjudged Horace guilty and asked if Horace was married and how far he went in school. The judge, who apparently had his rap sheet, noted that Horace started having trouble with the law in 1945. The judge then asked about the location of an apparent 30 year

sentence Horace had received. A prosecutor stated: "Levy County, I believe." The court asked Horace if he had filed a petition on the Gideon case. When Horace said "yes," the prosecutor corrected him and advised that "some time in the past there had been an adjudication of incompetency and following that the sentence was set aside by the appellate court; he was reexamined and found to be competent and a subsequent sentence was again imposed in Levy County--for I don't know what number of years." The judge asked if he served his time and the prosecutor said: "Yes." Thereupon, the court sentenced Horace to confinement in the Florida State Prison for the duration of his natural life. Thus, the entire guilty plea and sentencing transpired with no mention of any constitutional rights or factual basis for the plea. None of the transcripts

mentioned penalty until it was imposed. No finding of sanity at the time of the act was made by the court. The court did not ask Horace if he was in fact guilty. Horace was paroled for lifetime supervision on September 24, 1974.

On January 18, 1977, Horace was indicted in the United States District Court, Northern District of Florida for bank robbery. The United States District Court committed Horace to the Medical Center at Springfield, Missouri, for competency assessment. Three months later, the federal court held a competency hearing and found Horace not competent to stand trial. Horace was sent back to Springfield for further mental examinations to determine whether he was likely to regain his competency to stand trial. On February 10, 1978, United States District Judge, the Honorable William Stafford, found that

there was no substantial likelihood that Horace would regain his competency within the foreseeable future, and he dismissed the federal indictment, and released Horace to the sheriff of Leon County, Florida.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit Court of Appeals has by its opinion determined that Florida law comtemplates that where the trial court has reasonable cause to believe that the accused is incompetent it must conduct a full hearing and cannot rely upon written reports in making that determination even where the parties', attorneys and court agree. This interpretation of Florida law is in direct conflict with Florida Supreme Court decisions which provide that sanity can be determined by the court without a formal hearing when the parties agree.

This court in its opinion in Wainwright v. Goode, 464 U.S. 78 L.Ed. 2d 187 (1983) held that views of a state's highest court with respect to state law are binding on federal court's. The court of appeal's opinion in the instant case clearly has ignored the Florida Supreme Court decisions

on this issue.

This court also held in Wainwright v. Sykes, 433 U.S. 72 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977) that a defendant's failure to raise an issue on direct appeal in state court bars review of that issue by Federal court's based upon the doctrine of procedural default. The Eleventh Circuit Court's opinion that procedural default did not apply in the instant case is in conflict with this court's opinion in Sykes, supra. For these reasons this court should accept jurisdiction.

I. WHETHER UNDER FLORIDA LAW IT IS NECESSARY TO CONDUCT A FORMAL COMPETENCY HEARING IN ORDER TO AFFORD AN ACCUSED DUE PROCESS OR IF A DETERMINATION OF COMPETENCY MADE BY THE TRIAL COURT ON WRITTEN REPORTS SATISFIES DUE PROCESS REQUIREMENTS.

Petitioner concedes that an accused cannot be tried, sentenced or executed while he is insane. It is also equally true that where a trial court has reasonable grounds to believe that the accused is insane it must make a determination of the accused mental capacity before proceeding to trial. The Eleventh Circuit Court of Appeal's in the present case has construed Florida law to require a trial judge to conduct a formal hearing to determine an accused competentcy and that this hearing cannot be waived by the defendant's attorney. The Eleventh Circuit Court's interpretation of Florida law totally ignores the Florida Supreme Court opinion in Fowler v. State, Fla. 1971 255 So.2d 513. In Fowler the defendant filed a motion for appointment of expert witnesses

in which he requested a hearing under Rule 1.210(a), R.C.R. (now Rule 3.210(a) in response to the motion, the court appointed two psychiatrists who both submitted written reports to the effect that the defendant was not competent to stand trial. The state then obtained the appointment of a third expert who concluded that defendant was competent to stand trial. The court then entered an order in the presence of counsel finding defendant competent to stand trial, but no formal hearing was held to the entry of the order. The Supreme Court held that the trial judge should have held a hearing pursuant to Rule 1.210(a), R.C.P. because the two medical reports clearly constituted reasonable grounds to believe a defendant insane. However, the court went on to say:

> Our decision on this issue is not to be construed in making a hearing requirement non waivable, even in

> situations where reasonable grounds to believe defendant insane exists. In the recent case of Brown v State, 245 So.2d 68 70 (Fla. 1971) involving a similar situation, this court speaking through Justice Atkins, stated: 'the defendant then requested further examaination by experts. The court, in entering an order finding the defendant sane incapable of standing trial, recited that the reports of the experts previously appointed to examine the defendant had been examined, and that the attorney for defendant had announced that he had no testimony to offer and did not wish to cross-examine the experts who rendered the written reports. The court in its order also found that no useful purpose could be served by any further examination.'
>
> "We concur that where the parties and the judge agree the trial court may decide the issue of competency on the basis of the written reports alone. But where, as here, there are reasonable grounds to believe the defendant insane, and defense counsel requests a hearing, it is err not to provide such a hearing."

Although, due to the facts, the Court in Fowler reversed and remanded to the trial court to conduct a hearing. There can be no doubt that Florida law does permit a

trial judge to make a finding of competency, based upon the written reports of experts without a formal hearing. The best evidence of this can be found in the opinions of the Florida appellate courts which, although intermediate appellate courts, are courts of final jurisdicition as a matter of right whose function is to carry out and apply state law. This pronouncement by the Florida Supreme Court in Fowler concerning competency hearings at the trial level was applied to a similar factual situation in Bolius v. State, 319 So.2d 85 (Fla 2d DCA 1975). In Bolius, the Appellant claimed the trial judge erred in failing to conduct a formal sanity hearing. The court in Bolius however cited Fowler, supra in support of its conclusion that a defendant had waived his right to an evidentiary hearing. In so doing the court stated:

> In the case sub justice, while Dr. Meadows report provided reasonable grounds to believe the defendant insane, the defense counsel did not request a formal hearing and took a position totally inconsistent with the need for having such a hearing. Under these circumstances requirement of a formal sanity hearing at which the doctors would appear was waived.

This same principle of law, that when the parties, attorneys and the judge agree, the trial court may decide the issue of competency on the basis of written reports has also been cited as controlling in McKnight v. State, 319 So.2d 647 (Fla. 3rd DCA 1975), Lopez v. State, 405 So.2d 484 (Fla. 3rd DCA 1981, Wells v. State, 417 So.2d 772 (Fla. 3rd DCA 1982). See also Hatchell v. State, 328 So.2d 874 (Fla. 1st DCA 1976).

In the present case, although the prior mental problems may have provided reasonable grounds for the judge to believe the respondent insane, the defense attorney just as the defense attorneys did in Brown,

Fowler, Boyales, Lopez, McKnight, and Wells, after reading the doctor's reports abandoned his request for a formal hearing. This position was totally inconsistent with a need for a hearing and consistent with agreeing to the judge making a determination of competency based upon written reports.

In ignoring Fowler and its prodigy the Eleventh Circuit Court in its opinion has attempted to create a distinction between an accused who has never been declared incompetent and one who has been so adjudicated incompetent by basing their findings upon the Florida Supreme Court decisions in Horace v. Culver, Fla. 1959, 111 So.2d 670. The Eleventh Circuit Court of Appeal's has cited Horace v. Culver, for the proposition that where an accused has been once declared incompetent that he remains incompetent until sanity has been

determined in a formal hearing. The Petitioner submits that a careful reading of the Supreme Court's language in Horace v. Culver indicates the contrary. The Floridas Supreme Court in Horace v. Culver stated :

> Respondent recognizes the rule of our cases holding that a person adjudged to be insane is presumed to remain in that condition until it is shown that sanity has returned. While the presumption raised by the adjudication is not conclusive, the effect of the decision is that it must be recognized unless and until it is overcome by a contrary finding or proof that at a particular time the party previously adjudged incompetent was in fact of sound mind.

The Petitoner submits that the court's decision clearly indicates that the accused's incompetency is a rebuttable presumption which can be overcome either in a formal hearing or by an existance of circumstances which clearly indicate the accused's competency. Likewise Petitioner submits that the Supreme Court's decision

in Perkins v. Mayo, Fla. 1957 92 So.2d 641 does not require a formal hearing for competency to be restored but merely requires that for the presumption to be overcome it must be shown that his sanity has returned. Id. at 644 citing Corbin v. State 129 Fla. 421, 176 So. 435. Moreover it should be pointed out to this Court that the Florida Supreme Court's decisions in Horace and Perkins were decided prior to Folwer and its prodigy.

Even assuming arguendo that the Florida Supreme Court decision in Horace and Perkins created the distinction implicitely relied upon by the Eleventh Circuit Court that distinction would not apply to the present case. Any legal presumption which arose by virtue of the 1950 adjudication of incompetency is negated by the 1960 virdict of guilty in Horace v. Culver on remand from the Florida Supreme Court. The

Florida Supreme Court had remanded the case to the trial court whereupon the trial court, after psychiatric evaluation, committed the respondent to Florida State Hospital. A-8,A-9. In August 1960, the trial court entered an order indicating that the examination had been completed "and (Horace) was not psychotic. This order entered by the court and the jury verdict of guilty were a legal and factual finding of competency. It is clear that in order for the respondent to have been convicted following remand of his case upon appeal, the court would have had to have a competency hearing and determined that Respondent was competent before proceeding to trial. A contrary conclusion would be prepostorous since it would mean that the trial court flagrantly disobeyed the explicit orders of the Florida Supreme Court. It is even more obvious that the

court would have had a formal competency hearing in light of the fact that the respondent did not appeal his 1960 conviction following remand from the Florida Supreme Court. Thus, when the Respondent came before the court in 1966, his competency having been restored in 1960, the issue of competency could be determined in a formal hearing or by use of the written reports as permitted in Fowler. The Eleventh Circuit Court's construction of Florida law blatantly disregards the Florida Supreme Court's decision's in Fowler and hence is in direct conflict with this Court's opinion in Wainwright v. Goode, 464 U.S. 78 L.Ed. 2d 187, 104 S.Ct. 378 and this Court's decision in Wainwright v. Stone, 414 U.S. 21 38 L.Ed. 2d 179 94 S.Ct. 190. In Stone, and this Court stated that with respect to issues of State law the views of the

state's highest court were binding on the Federal Courts. See also Brown v. Ohio, 432 U.S. 161, 53 L.Ed. 2d 187, 97 S.Ct. 22-21 (1977).

The Eleventh Circuit's total disregard for the Florida Supreme Court's pronouncements on state law in defiance of this court's decisions can only be held in check by this court's exercise of its supreme jurisdiction.

II. WHETHER THE UNITED STATES ELEVENTH CIRCUIT COURT OF APPEAL'S FINDING THAT THE PROCEDURAL DEFAULT DOCTRINE DID NOT APPLY TO THE RESPONDENT'S WAIVER OF COMPETENCY HEARING AND FAILURE TO RAISE ISSUE OF HIS COMPETENCY ON DIRECT APPEAL CONFLICTS WITH THIS COURT'S DECISION IN WAINWRIGHT V. SYKES, 433 US. 72 53 L.ED. 2D 594 1977 AND ENGLE V. ISAAC, 456 U.S. 107 71 L.ED. 2D 783 1982.

It appears that the Court of Appeal's reached its decision that the Respondent's attorney could not legally waive a formal hearing on the issue of Respondent's competency is erroneously based on rationale reminiscent of the outmoded opinion in Fay v. Noia, 372 U.S. 39, 9 L.Ed. 2d 837 (1963). In making their decision the court asssumed that the Appellant was incompetent, ignoring the fact of a 1960 state court order and conviction and the two written reports filed by the physicians in the 1966 case. The Respondent was represented by competent counsel who was

convinced by the doctors reports that his client was competent to enter a plea. The Respondents attorney had investigated his client's prior mental history and moved for psychiatric examination. The lawyer exercised his professional judgment and elected to have the issue of competency determined on the basis of the written reports. When faced with the two reports declaring his client competent he did not need to go through a plenary review of the issue. If the Eleventh Circuit's decision is allowed to stand then an attorney will be required to have a hearing on every issue which arises in a case even after he makes a competent professional determination that he would not prevail and that to continue to hearing would be futile. He would be required to do this even if to do so was detrimental to his client. The attorney is not required to be completely perfect and

to make perfect judgments but is only required to give reasonably competent advice to his client. McMann v. Richardson, 397 U.S. 759 25 L.Ed. 2d 763 90 S.Ct. 1441 (1970). Moreover, there has been no finding in this case that council was incompetent or ineffective. As pointed out by this court in Estelle v. Williams, 425 U.S. 501 48 L.Ed. 2d 126 (1976):

> Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during the trial rest with the accused and his attorney. Any other approach would rewrite the duties of trial judge's and counsel in our legal system. (The decision to waive formal hearing on the issue of competency was one of those decisions which is within the responsibility of the trial attorney).

The Eleventh Circuit Court's opinion is

an outrageous attempt to find an antiquated state court decision to support its position in an effort to further dilute the procedural default doctrine as promulgated by this court in Wainwright v. Sykes. Petitioner therefore urges this court to grant certiorari on this issue and reaffirm the principle of procedural default.

CONCLUSION

Petitioner has sought to present to the court a substantial basis upon which to conclude that this area of law is deserving of being addressed by the United States Supreme Court. There is a clear jurisdictional basis predicated upon conflicts between the opinion to be reviewed and the opinions of the United States Supreme Court and the Florida Supreme Court. Furthermore, the case presents substantial questions of Federal law that have nation wide importance as demonstrated by this court's acceptance of jurisdiction in the cases which the appeal's court is in conflict with. There are no collateral issues contained in the instant factual pattern which could have the effect of diverting this court's attention away from the issues herein presented. On the basis of the above, petitoner submits that the

instant petition for writ of certiorari should be granted.

Respectfully submitted,

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Raymond L. Marky
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Kurt L. Barch
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The Capitol
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by U.S. Mail to Howard W. Skinner, 221 East Church Street, Jacksonville, Florida 32202 on this _____ day of April, 1986.

Kurt L. Barch
Assistant Attorney General

Raymond L. Marky
Assistant Attorney General

APPENDIX

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Willie Wesley HORACE
Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, Respondent-Appellee.
No. 85-3343.

United States Court of Appeals, Eleventh Circuit.

Feb. 14, 1986.

On Appeal from an order of the United States District Court for the Middle District of Florida, Howell W. Melton, Jr., dismissing habeas corpus petition by which petitioner sought reversal of his state conviction for robbery and sentence to life imprisonment, the Court of Appeals, Tuttle, Senior Circuit Judge, held that: (1) mental competency of petitioner, who in 1953 escaped from state hospital to which he had been committed after being adjudged incompetent, was not adequately established at time of 1966 trial on robbery charge and

at the time petitioner's appointed counsel conceded competency to stand trial and to enter plea of guilty; there was no hearing of any kind on the issue of mental competence at the time of commission of the act, and the submission of ex parte letters by doctors and the judge's determination that petitioner was competent to stand trial also lackd the characteristics of a formal hearing as contemplated by the Florida statutes; (2) since, as a matter of law, petitioner was not competent at the time of plea hearing, he could not knowingly or intelligently waive his right to have the court determine his capacity to stand trial; furthermore, even without regard to petitioner's competence at the time of entering plea, trial court failed to determine that the plea was made voluntarily with understanding of the nature of the charge and consequences of

the plea; (3) petitioner's claims of incompetency to stand trial, insanity at time of act, and an unknowing and involuntary guilty plea were not barred by the procedural default rule; and (4) delay by petitioner in filing his petition for habeas corpus did not render the petition subject to dismissal on grounds of laches.

Reversed and remanded.

Hill, Circuit Judge, filed a specially concurring opinion.

1. Criminal Law 625, 981(1)

An accused cannot, under Florida law, be tried, sentenced or executed while insane.

2. Criminal Law 625

Under Florida law, once there is a formal adjudication of insanity of a person charged with a crime, there must also be a formal hearing before the presumption of

insanity terminates.

3. Criminal Law 625

Mental competency of petitioner, who in 1953 escaped from state hospital to which he had been committed after being adjudged incompetent, was not adequately established at time of 1966 trial on robbery charge and at the time petitioner's appointed counsel conceded competency to stand trial and to enter plea of guilty; there was no hearing of any kind on the issue of mental competence at the time of commission of the act, and the submission of ex parte letters by doctors and the judge's determination that petitioner was competent to stand trial also lacked the characteristics of a formal hearing as contemplated by the Florida statutes.

4. Criminal Law 273(2), 273.1(4)

Since, as a matter of law, Petitioner was not competent at the time of plea

hearing, he could not knowingly or intelligently waive his right to have the court determine his capacity to stand trial; furthermore, even without regard to petitioner's competence at the time of entering guilty plea, the trial court failed to determine that the plea was made voluntarily with understanding of the nature of the charge and consequences of the plea.

5. Habeas Corpus 45.3(1.40)

Petitioner's claims of incompetency to stand trial, insanity at time of act, and an unknowing and involuntary guilty plea were not barred by the procedural default rule of Wainwright v. Sykes.

6. Habeas Corpus 50

Mere delay is not sufficient ground for dismissal of a habeas petition on the basis of laches; the state must also show particularized prejudice to its ability to

respond to allegations in the petition. Rules Governing §2254 Cases, Rule 9(a), 28 U.S.C.A. foll. §2254.

7. Habeas Corpus 50

Delay in filing of a petition for habeas corpus by a person incompetent at the time of original trial and, presumably, incompetent subsequent to that time does not render the petition subject to dismissal on the ground of laches. Rules Governing §2254 Cases, Rule 9(a), 28 U.S.C.A. foll. §2254.

Appeal from the United States District Court for the Middle Distict of Florida.

Before HILL and HENDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

Horace appeals from the dismissal of his petition for habeas corpus by which he seeks a reversal of his conviction of robbery and a sentence to life imprisonment

in the Circuit Court in Alachua County, Florida on January 7, 1966. Horace was subsequently placed on life probation, and is therefore not now in custody.

I. STATEMENT OF THE CASE

A. Historical Background

On August 5, 1950, Horace was duly adjudged to be incompetent (dementia praecox) and was committed to the Florida State Hospital by a county judge for Leon County, Florida, pursuant to §394.20, Florida Statutes (1940). In December 1953, Horace escaped from the institution. A certified search of the records in Leon County, Florida in March 1977, reveals that Horace's formal adjudication of incompetency remained in effect at all times material hereto.

Subsequently, on March 14, 1955, Horace was convicted on pleas of guilty to three charges, and was sentenced to 30 years

imprisonment. These convictions were reversed by the Florida Supreme Court by an opinion which contained the following language.

> Respondent recognizes the rule of our cases holding that a person adjudged to be insane is presumed to remain in that condition until it is shown that sanity has returned. While the presumption raised by the adjudication is not conclusive, the effect of the decisions is that it must be recognized unless and until it is overcome by a contrary finding or proof that at a particular time the party previously adjudged incompetent was in fact of sound mind. In the situation at bar, the rule clearly requires that the judgments and sentences imposed against petitioner, as well as his plea to the charges against him, be vacated and set aside.

111 So. Rep.2d 670, 671 (1959) (footnote omitted).

Upon remand, upon receipt of a report from a doctor appointed to determine Horace's sanity, November 11, 1959, the court ordered Horace "readmitted to Florida State Hospital for a period of three to six

months to more accurately determine [his' mental status.]" On August 1, 1960, the court entered an order indicating that the examination had been completed "and that [Horace] is not considered psychotic." The next record available reflects that on September 26, 1960, Horace was convicted by a petit jury of breaking and entering and received a five year sentence with credit for time served.

B. Contested Conviction[1]

In 1965, Horace was charged with robbery in Alachua County, Florida. On September 24, 1965, the Honorable James C. Atkins, Jr. appointed the public defender

[1] The statement contained under this subdivision has been accepted by the parties as acurate under the following statement in the state's brief: "The statement of fats contained on pp. 7-11 of appellant's brief generally appear to be an accurate summary of the facts." The statement contains all the revelant fats almost verbatim as stated by the appellant.

and the information was read to Horace. No penalties were mentioned. Appointed counsel entered a plea of not guilty and not guilty by reason of insanity. Medical doctors, Josh D. Davis and Henry L. Lyons, were appointed by the court to examine Horace. On December 6, 1965, a different public defender appeared before a different judge and copies of the doctors' reports were handed to the judge. Dr. Lyons' letter states that it was his "impression" that Horace was competent at the time of the act and "competent now" and able to cooperate with counsel in his defense. The report of Dr. Davis states that "Horace has a personality disorder which is essentially of no consequence to the court" and it was his "impression that Horace [was malingering] in contrast to being psychotic or insane." Dr. Davis' report contains no specific findings as to competency at the

time of the act or competency to stand trial.

Then at the hearing, defense counsel stated: "The defendant is going to waive this sanity hearing at this time and announce his competency to be tried." The judge found Horace competent to stand trial based on the two reports and the public defender's statement. The judge said: "Whether he was crazy when he did it would be a question for the jury, I would assume. Or insane." (sic)

On January 7, 1966, the parties appeared before the trial court. Thereupon, defense counsel moved to withdraw the plea of not guilty and not guilty by reason of insanity and entered a plea of guilty. The judge asked counsel if he "discussed this matter with the defendant and the nature of the charge and all the necessary elements." Counsel responded: "Yes, Your

Honor, and I have had the case thoroughly investigated." The court then asked Horace his age and counsel made a one sentence statement in mitigation referring to Horace's "long history of mental disturbance." The judge asked who the victim was. The court then adjudged Horace guilty and asked if Horace was married and how far he went in school. The judge, who apparently had his rap sheet, noted that Horace stated having trouble with the law in 1945. The judge then asked about the location of an apparent 30 year sentence Horace had received. A presecutor stated: "Levy County, I believe." The court asked Horace if he had filed a petition on the Gideon case. When Horace said "yes," the prosecutor corrected him and advised that "some time in the past there had been an adjudication of incompetency and following that the sentence was set aside by the

appellate court; he was reexamined and found to be competent and a subsequent sentence was again imposed in Levy County- for I don't know what number of years." Another prosecutor remarked "five years." The judge asked if he served his time and the prosecutor said: "Yes." Thereupon, the court sentenced Horace to confinement in the Florida State Prison for the duration of his natural life. Thus, the entire guilty plea and sentencing transpired with no mention of any constitutional rights or factual basis for the plea. None of the tanscripts mentioned penalty until it was imposed. No finding of sanity at the time of the act was made by the court. The court did not ask Horace if he was in fact guilty. Horace was paroled for lifetime supervision on September 24, 1974.

C. Subsequent Indictment and Competency Determination

On January 18, 1977, Horace was indicted in the United States District Court, Northern District of Florida for bank robbery. The United States District Court committed Horace to the Medical Center at Springfield, Missouri, for competency asssessment. Three months later, the federal court held a competency hearing and found Horace not competent to stand trial. Horace was sent back to Springfield for further mental examination to determine whether he was likely to regain his competency to stand trial. On February 10, 1978, United States District Judge, the Honorable William Stafford, found that there was no substantial likelihood that Horace would regain his competency within the foreseeable future, and he dismissed the federal indictment, and released Horace to the sheriff of Leon County, Florida.

II. THE ISSUES

After careful consideration of the record, we conclude that the following issues are before this Court:

1. Was Horace's mental competency adequately established at the time of the trial and at the time that his counsel conceded competency to stand trial, and competency to plead guilty and enter such a plea?

2. Does the record show that when it accepted the plea of guilty the court could know the accused had an understanding of the "consequences of the plea," the law prior to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)?

3. Whether Horace's contentions in regard to the above issues should be barred because of the rule of

procedural default or on the ground of laches.

III. DISCUSSION

[1] 1. The State does not contest appellant's argument that an accused cannot under the law of Florida be "tried, sentenced or executed while insane." In Fact, the court said as much in Horace v. Culver, 111 So.2d 670, the case which was reversed in favor of the present appellant on his earlier conviction. The court there said:

> The decided cases adequately dispose of the contention that any burden might rest upon the disabled party in such circumstances to inform the court or formally plead his status. An accused cannot under our law be tried, sentenced or executed while insane, and the ignorance or good faith of the court and prosecuting officers does not serve to validate a proceeding conducted in violation of this precept.

111 So.2d at 671.

The question then becomes "was Horace 'sane' or 'insane' at the time his counsel pleaded guilty on his behalf at the trial at issue here."[2] The Florida Supreme Court, again in Horace, answered that question also. The court said:

> ...This court has however previously approved the use of the writ of habeas corpus to set aside a judgment of conviction in circumstances very similar to those here involved, where a prior adjudication of incompetence had not, at the time of sentence, been formally controverted or overcome and we affirm the conclusions reached in that case. (Emphasis added.)

The case referred to in Horace is Perkins v. Mayo, 92 So.2d 641, at p. 644 where the court said:

> It is last contended that having been adjudicated a mental incompetent by

[2] We use the term "sane" as shorthand for mental competency because that was the term generally in use at the time of the cited cases.

> the Circuit Court of Leon County, petitioner is presumed to have remained so, until a formal adjudication of competency, and being so the adjudications and sentences imposed by the court on May 2, 1950, are illegal and void. We think there is merit to this contention... Petitioner having been adjudicated mentally incompetent Feb. 15, 1949, he is presumed to remain in that state until a proper hearing is held and he is adjudicated to be mentally competent as provided by Section 917.01(2), Florida Statutes [F.S.A.] (1949). It is accordingly our view that petitioner should be remanded to the custody of the sheriff of Leon County and by said sheriff delivered to the Circuit Court for further proceedings in accordance with Section 917.01, Florida Statutes, F.S.A. . . .

Section 917.01(2) of the Florida Statutes of 1949 provides as follows:

> [I]f, after a defendant has been committed to an institution as insane, the proper officer of such institution is of the opinion that the defendant is sane, he shall report this fact to the court which conducted the hearing. If the officer so reports, the court shall fix a time for a hearing to determine whether the defendant is sane. This hearing shall be conducted in all respects like the original hearing to determine the defendant's sanity.

The manner of conducting "the original hearing" referred to is outlined in Section 917.01(1). It deals with the issue of a defendant giving reasonable ground to believe tht he is insane prior to or during a trial. It provides as follows:

> 917.01 Examination of defendant's mental condition to determine whether he shall be tried-(1) If before or during trial the court, of its own motion, or upon motion of counsel for the defendant, has reasonable ground to believe that the defendant is insane, the court shall immediately fix a time for a hearing to determine the defendant's mental condition. The court may appoint two disinterested qualified experts to examine the defendant and to testify at the hearing as to his mental condition. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party.

(Emphasis added.)

[2] The acceptance by the Horace court of the Perkins decision, also by the

Florida Supreme Court, makes it perfectly clear that under the Florida law, once there is a formal adjudication of insanity of a person charged with a crime, there must also be a formal hearing before the presumption of insanity terminates.

[3] Here, although, just prior to the aborted trial, the trial court received letters from two medical doctors which caused him to conclude that Horace was competent to stand trial, the trial court make no effort to determine whether Horace was competent at the time of the commission of the act. The court stated that that decision would be made by the jury. Instead, however, of that issue being submitted to the jury, a decision was made by Horace's lawyer to withdraw the plea of not guilty by reason of insanity and to enter a plea of guilty. In other words, there was no hearing of any kind on the

issue of mental competence at the time of the commission of the act. The submission of ex parte letters by the doctors and the trial judge's determination that Horace was competent to stand trial also lacked all of the characteristics of a formal hearing as contemplated by the Florida Statutes. Nevertheless his lawyer deprived Horace of his right to introduce evidence and to cross-examine the medical experts, rights which are contemplatd under the statute.

[4] 2. Unless we decide that appointed counsel may legally make the decision that Horace was mentally competent without the statutory hearing, we must hold counsel's waiver of these rights to be void. We are of the opinion that our decision that as a matter of law, Horace was not competent at the time of the plea requires a holding that he was incapable of making "an intentional relinquishment or

abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). The Supreme Court stated in Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed. 2d 815 (1966): "It is contradictory to argue that a defendant may be incompetent and yet knowingly or intelligently waive 'his right to have the court determine his capacity to stand trial.' " 384 U.S. at 384, 86 S.Ct. at 841. Moreover, in our recent case, Adams v. Wainwright, 764 F.2d 1356 (11th Cir.1985), we said in discussing Pate v. Robinson:

> The secondary basis for its holding was that [i]n any event,' waiver had actually occurred because Robinson had made his sanity an issue throughout his trial. Pate v. Robinson, supra, 383 U.S. at 384, 86 S.Ct. at 841. Later decisions in this Circuit have applied the initial rationale of Pate v. Robinson in such a manner as to obviate the need for any inquiry into whether a convicted defendant

> who is alleging mental incompetency actually waived his right to a competency hearing at the time of his trial. These decisions have squarely held tht waiver cannot occur. See Zapata v. Estelle, supra, 588 F.2d at 1021; Nathaniel v. Estelle, supra, 493 F.2d at 798; Bruce v. Estelle, supra, 483 F.2d at 1037.

764 F.2d 1358.

We, therefore, conclude that at the time of his plea, Horace must be presumed to have been still incompetent.

Even, however, without regard to the mental competence of an accused at the time of entering a plea of guilty, this Court's predecessor[3] said:

> If this were a federal trial, or if it were a state trial held subsequent to June 2, 1969 [the date of the Supreme Court case, Boykin v. Alabama

[3] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), the court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. Id. at 1201

> 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274], it would be clear, without discussion, that a plea accepted as was this one could not stand. Federal pleas of guilty may not be accepted by the trial judge under Rule 11 of the Federal Rules of Criminal Procedure "without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." In Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 274, the Court stated:
> "It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."

Wade v. Wainwright, 420 F.2d 898 (5th Cir. 1969) (Emphasis added.)

The Supreme Court has subsequently stated that the holding in Boykin v. Alabama is not retroactive, so the Court in Wade announced the pre-Boykin law of the Circuit. The Court said:

> However, this Court, as have other courts, has held, in construing the language of the concept of voluntariness tht it comprehends an under-

> standing of the "consequences of the plea." Trujillo v. United States, 5 Cir., 1967, 377 F.2d 266; Kotz v. United States, 8 Cir., 1965 353 F.2d 312. VonMoltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948) required, as a prerequisite for a valid waiver an "apprehension of. . . the range of allowable punishments."

As this court has held, and, of course, as no one can now seriously doubt, "it is well settled that a conviction, whether in a state or federal court, which is based upon an involuntary or coerced plea of guilty, whether it be unfairly obtained or given through ignorance, fear or inadvertence, is invalid as inconsistent with due process of law." (Emphasis added). Busby v. Holman, 5 Cir., 1966, 356 F.2d 75, 78. In light of the decisions to the effect that the term "ignorance," when related to the entering of a plea of guilty, comprehends a lack of knowledge as

to the consequences of the plea, it seems clear that the failure of the trial court to assure itself with respect to ascertaining whether the accused knew the outer limits of the penalty which he could suffer upon entering the plea, is inconsistent with due process of law, as understood long before the most recent pronouncements in Boykin.

420 F.2d at 900 (footnote omitted) (emphasis added.)

Here, the statement of the case above comprises the complete report of the colloquy between the court, the defendant, his counsel and the prosecutors, who answered several of the questions asked by the court at the hearing on the acceptance of the guilty plea. From this short discussion, it is clear that the trial court "failed to assure itself with respect to ascertaining whether the accused knew

the outer limits of the penalty which he could suffer upon entering the plea." Wade, supra, at 900. It is especially clear that Horace was told of none of his constitutional rights that he was waiving."

The only hearing held by the magistrate on petitioner's habeas corpus petition was with respect to this particular matter. The only testimony as to whether Horace knew of the outer limits of the sentence that he could receive was given by him. He denied having any such knowledge. The magistrate made a finding to the effect that he did not credit the testimony by Horace, and therefore, found that he had such knowledge. While, of course, it was within the competence of the magistrate to find that Horace's testimony was not believable, this did not obviate the requirement that there be proof that Horace actually did have such knowledge. There is

no such proof in this record, and the magisrate's finding that Horace knew of the life sentence possibility is clearly erroneous, as was the trial court's finding approving the magistate's report.

[5] 3. The district court denied relief to petitoner on his claims of incompetency to stand trial, insanity at the time of the act, and unknowing and involuntary guilty plea on the basis of the procedural default rule of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). The court concluded that Horace's failure to take a direct appeal operated as a waiver of these claims. That this holding was error is made plain by our recent case in the above-cited Adams v. Wainwright, where we said:

> Binding precedent fully supports the petitioner's contention tht the procedural default rule of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), does not

> operate to preclude a defendant who failed to request a competency hearing at trial or pursue a claim of incompetency on direct appeal from contesting his competency to stand trial and be sentenced through post-conviction proceedings. See Zapata v. Estelle, 588 F.2d 1017, 1021 (5th Cir. 1979); Nathaniel v. Estelle, 493 F.2d 794, 798 (5th Cir. 1974); Bruce v. Estelle, 483 F.2d 1031, 1037 (5th Cir. 1973). Indeed as the Supreme Court stated in Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), 'it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial.' Id. at 384, 86 S.Ct. at 841; Bruce v. Estelle, supra, 483 F.2d at 1037. Therefore, the district court below erred in holding that the petitioner was procedurally barred from pursuing a claim of mental incompetency in a federal habeas corpus proceeding.

Adams v. Wainwright, 764 F.2d 1356 at 1359 (11th Cir. 1985).

It is clear, therefore, that these claims cannot be barred on the basis of the procedural default rule.

The same ruling must apply to the

defense of laches under Rule 9(a) of the rules for application of habeas corpus. This rule provides:

> Rule 9(a). Delayed Petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

[6] The courts have uniformly held that this rule is a rule based upon the equity principle of laches, McDonnell v. Estelle, 666 F.2d 246 (5th Cir. 1982), Alexander v. State of Maryland, 719 F.2d 1241 (4th Cir. 1983). The cases also hold that mere delay is not sufficient ground for dismisal on the basis of laches. The state must show a particularized prejudice to its ability to respond to the allegations in the petition. McDonnell, supra;

Henson v. Estelle, 641 F.2d 250 (5th Cir. 1981).

[7] No authority has been cited to us to show that a delay in the filing of a petition for habeas corpus by a person incompetent at the time of the original trial and, presumably incompetent subsequent to that time, has been dismissed on the ground of laches. We consider it inconsistent with the mental status of the petitioner here to hold that he "knew or should have known" of either his right or obligation to raise these issues sooner especially in light of his explanation that he lacked funds and knowledge to take advantage of a lawyer's advice as to what, if any, protections were available to him.

It is inconsistent to hold that Horace failed to act timely with respect to the remedies he now seeks, during the time when he was presumptively incompetent as it

would to find him barred from taking advantage of the use of the writ of habeas corpus because of his procedural default.

The judgment is REVERSED and the case is REMANDED to the district court for further proceedings not inconsistent with this opinion.

HILL, Circuit Judge, specially concuring:

> I agree with the opinion insofar as it discusses the fact that petitioner had been adjudicated mentally incompetent and never formally restored to competency. For that reason, the writ must be granted. Resolution of the competence issue alone requires reversal. I would not reach the question of whether the plea was knowing and volunary under the procedural approach used by the state trial judge when the plea was taken some twenty years ago.

UNITED STATES DISTRICT COURTS
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WILLIE WESLEY HORACE,

Petitioner,

vs. CASE NO. 79-793-Civ-J-M

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Respondent.

ORDER

On March 29, 1985, this court entered an Order dismissing petitioner's Amended Petition for Habeas Corpus as supplemented by his Second Amended Petition. It appearing to the Court that several lines were inadvertently dropped from Section II. C. entitled "Knowing and Voluntary Plea", it is

ORDERED;

That Section II.C. entitled "Knowing

and Voluntary Plea" is hereby amended to read as follows:

C. Knowing and Voluntary Plea

This court has concluded that petitioner is procedurally barred from collaterally attacking the voluntariness of his plea. Notwithstanding this conclusion, the Court agrees with the R & R that this delayed claim could also be denied pursuant to Rule 9(a), Rules Governing §2254 cases. Respondent has demonstrated that he has been prejudiced by petitioner's thirteen-year delay in filing this claim. See Affidavits, filed May 16-17, 1984. Moreover, the Court concludes that had petitioner exercised reasonable diligence he would have raised this claim before the prejudicial circumstances had occurred. Unlike the issue of exhaustion, Rule 5, Rules Governing §2254 cases, does not require a defense based on Rule 9(a) to be

asserted in the answer. Accordingly, petitioner's objections as to the voluntary and knowing nature of his plea ar overruled.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 4th day of April 1985.

Howell W. Melton
UNITD STATES DISTRICT JUDGE

Copies to
Hon. Howard T. Snyder
United States Magistrate
Mr. Willie Wesley Horace
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WILLIE WESLEY HORACE,

PETITIONER,

VS. Case no. 79-793-Civ-J-M

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Respondent.

ORDER

This cause is before the Court on an Amended Petition for Habeas Corpus Relief and a Second Amended Petition for Habeas Corpus Relief filed on October 21, 1981, and January 22, 1982, respectively. The court will construe the Second Amended Petition as a supplement to the Amended Petition.

This matter was considered by the United States Magistrate pursuant to

standing order concerning assignment of state prisoner habeas corpus cases. The Magistrate entered a Report and Recommendation ("R & R") on June 11, 1984, recommending that both petitions be dismissed with prejudice. Both petitioner and respondent filed objections to the R & R on June 21, 1984.

Pursuant to 28 U.S.C. § 636(b)(1)(c) (1982) and Rule 6.02, Local Rules of the Middle District of Florida, the Court must conduct a de novo review of the petitions. The court will address each objection in turn, beginning with respondent's objections.

I. RESPONDENT'S OBJECTIONS

A. Exhaustion

The Magistrate found that even though petitioner had failed to exhaust his claim of ineffective assistance of counsel,

respondent had waived this issue by failing to assert it in his answer. Respondent claims he did not expressly waive exhaustion and in fact raised the issue in a motion for summary judgment.

Under Rule 5 of the Rules Governing § 2254 cases, a respondent is directed to address the issue of exhaustion of state remedies in the answer. Respondent not only failed to raise the matter of exhaustion of the ineffective counsel claim, but in fact, addressed the merits of said claim. See Response to Order to Show Cause, filed June 3, 1982. Although the Magistrate raised the exhaustion issue, sua sponte, it was not until approximately two years later that respondent asserted the issue in a motion for summary judgment.[1]

[3] Although respondent addressed exhuastion in his motion for summary judgment, he stated that he was "not contending that the

The rule of exhausting state remedies is not a matter of federal power to adjudicate habeas petitions, but is rather one of equitably exercising that power. Thompson v. Wainwright, 714 F.2d 1495, 1504 (11th Cir. 1983). This court is of the opinion that it would be inequitable to allow respondent to assert the issue of exhaustion some two years after vigorously defending against the claim on its merits. While respondent may not have expressly waived the exhaustion issue, the Court holds he is now estopped from

case should be dismissed for exhaustion." Motion for Summary Judgment at 14. Claiming that petitioner was in procedural default on his ineffective assistance of counsel claim, respondent pointed out that there was nothing left for petitioner to exhaust. To the extent that respondent objects to the Magistrate's finding of "implied waiver", the Court will address this issue on which all parties seem to agree--namely, that this petition should not be dismissed for failure to exhaust state remedies.

asserting it.

B. Procedural Default

Petitioner did not appeal his 1966 conviction and judgment which is under attack in this federal habeas proeedings. Respondent claims, therefore, that the following issues are subject to procedural default: (1) legal impediment to trial; (2) competency at plea and sentencing; (3) knowing and voluntary plea; and (4) effective assistance of trial counsel. Relying on Birt v. Montgomery, 725 F.2d 587 (11th Cir. 1984) (en banc), the Magistrate found that when a claim of ineffective assistance of counsel is raised, petitioner will not be bound by a procedural waiver of constitutional claims which are inextriably related to the ineffective assistance claim.

Respondent contends, and this Court

agrees, that the related claims may be considered on their merits[2] only if the attorney is found to have rendered ineffective assistance. In Birt, petitioner claimed he received ineffective assistance of counsel because his atorney failed to challenge the jury composition. The court could not address the merits of the jury challenge on collateral attack unless petitioner showed cause for and prejudice from failing to raise the issue before or during trial. The court stated that the cause element could be satisifed "when counsel is found to be ineffective." The court added "our determination of both of [petitioner's] claims will hinge

[2] The court recognizes that only the cause element is satisfied if counsel is found to be ineffective. Petitioner must also show prejudice resulting from each alleged error. Wainwright v. Sykes, 443 U.S. 72 (1977).

on whether [the attorney] rendered ineffective assistance of counsel." Birt, 725 F.2d at 597.

Thus, under Birt, the cause element for petitioner's failure to raise on appeal the claims related to ineffective assistance of counsel may be satisfied if counsel is found to be ineffective. The Court agrees with the Magistrate's conclusion that petitioner's counsel was not ineffective; therefore, petitioner has not satisfied the cause element on the principles set forth in Birt.

The Court further concludes that petitioner has failed to demonstrate any other grounds supporting cause for his failure to raise these defenses earlier. Upon reviewing the record and petitioner's testimony, the Court adopts the Magistrate's findings with respect to petititioner's knowledge of relief

available in the state courts. See R & R at 16. Accordingly, petitioner's claims of legal impediment to trial, incompetency at plea and sentencing, and involuntary guilty plea are procedurally barred. Even if these claims were not procedurally barred, the Court agrees with and adopts the Magistrate's conclusion that the first two claims are nonetheless without merit. See R & R at 6, 7-9.

II. PETITIONER'S OBJECTIONS

A. Legal Impediment to Trial and Incompetency at the Plea and Sentencing

Petitioner raises several objections to the findings and conclusions contained in the above-mentioned sections of the R & R. As previously stated, this Court is of the opinion that these claims are procedurally barred because petitioner has failed to demonstrate cause for not raising them on

direct appeal. Absent a procedural bar, however, the Court would adopt the findings of the Magistrate as to these two claims.

B. Assistance of Counsel

Petitioner continues to maintain that his counsel was ineffective for failing to learn of and investigate his previous adjudication of incompetency. Petitioner cannot, however, demonstrate the requisite prejudice from this alleged failure because the court was specifically informed of the previous adjudication of insanity. Amended Petition Exhibit B at C4-5. See also Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984).

The court affirms and adopts the Magistrate's findings with regard to the remainder of petitioner's claims based on ineffective assistance of counsel.

C. Knowing and Voluntary Plea

This court has concluded that petitioner is procedurally barred from collaterally attacking the voluntarinesss of his plea. Notwithstanding this conclusion, the Court agrees with the R & R that this delayed claim could also be denied pursuant to Rule 9(a), Rules Governing § 2254 cases. Respondent has demonstrated and knowing nature of his plea are overruled.

D. Parole Revocation Hearing

The Court adopts and affirms the Magistrate's findings that petitioner does not show a substantial doubt as to his competency at the parole revocation hearing. Accordingly, petitioner's objections on this issue are overruled.

It is, therefore,

ORDERED AND ADJUDGED:

1. That respondent's objections to the Report and Recommendation are hereby over-

ruled, in accordance with this Order;

2. That petitioner's objections to the Report and Recommendation are hereby overruled, in accordance with this Order;

3. That the Magistrate's Report and Recommendation is hereby adopted and affirmed, with the exceptions thereto noted in this Order;

4. That petitioner's Motion for Judgment on the Pleadings, construed as a motion for summary judgment, filed on November 23, 1982, is hereby denied;

5. That respondent's motion for summary judgment filed on May 9, 1984, is hereby granted;

6. That the Amended Petition for Habeas Corpus as supplemented by the Second Amended Petition for Habeas Corpus is hereby denied with prejudice.

7. That the Clerk of the Court shall enter Judgment dismissing this action with

prejudice.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 29th day of March, 1985.

HOWELL W. MELTON
UNITED STATES DISTRICT JUDGE

Copies to:

Hon. Howard T. Snyder
United States Magistrate

Mr. Willie Wesley Horace

Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WILLIE WESLEY HORACE

PETITIONER,

VS. CASE NO. 79-793-CIV-J-M

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida,

Respondent.

REPORT AND RECOMMENDATION[1]

Petitioner, Willie Wesley Horace, in forma pauperis filed an Amended Petition for Habeas Corpus Relief (hereinafter Petition) and a Second Amended Petition for Habeas Corpus Relief (hereinafter Second Petition) on October 21, 1981, and January

[1] Objections may be filed in accordance with 28 U.S.C. §636, and Rule 6.02, Local Rules, Middle District of Florida, within ten (10) days after service of this document. Failure to do so shall bar the party from a de novo determination by a district judge and from attacking factual findings on appeal.

22, 1982, respectively. Five issues are presented in the Petition and the Second Petition. The issues are, in part, whether (1) under Florida law there was a legal impediment to trial, (2) Petitioner was incompetent at the plea and sentencing and denied a competency hearing, (3) there was a denial of effective assistance of counsel, (4) the plea of guilty was not knowingly and voluntarily made, and 5) Petitioner's parole was improperly revoked while he was incompetent. A Response to Order to Show Cause was filed on June 9, 1982. On November 23, 1982, Petitioner filed a Motion for Judgment on the pleadings which was replied to by Respondent in a Response to Motion for Judgment on the Pleadings (hereinafter Response) filed December 7, 1982. By Order entered on May 4, 1984, the respective parties were notified that Petitioner's

Motion for Judgment on the Pleadings was being treated as a motion for summary judgment.

On May 9, 1984, a Motion for Summary Judgment, a Memorandum of Law (hereinafter Memorandum), and numerous Exhibits were filed. Thereafter, on May 16-17, 1984, Affidavits of Mack S. Futch, Judge R. A. Green, Jr., Justice James C. Adkins, Jr., and James R. Pierce were filed.

Exhaustion of State Remedies

Subsequent to the filing of various pleadings, the question as to whether Petitioner had exhaused his state remedies was raised sua sponte. See Order entered February 22, 1983. Subsequently, this circuit has clarified the law regarding the exhaustion of state remedies. The court in Thompson v. Wainwright, 714 F.2d 1495, 1502 (11th Cir. 1983), cert. denied, 52 U.S.L.W. 3791 (U.S. April 30, 1984) (No. 83-1421),

stated that "exhaustion is not an inflexible rule of subject matter jurisdiction that the court must raise sua sponte . . . . [T]he court concludes that the state has waived exhaustion by failing to raise the issue, either in the district court or on appeal." In a footnote Thompson set out the reasoning behind this view. The court stated:

> Judge Merritt, dissenting in Bowen v. Tennessee, 698 F.2d 241, 245 (6th Cir. 1983) (en banc), has set out the reasoning that underlies this approach: Rule 5 of the rules governing habeas corpus cases in the District Court adopted by the Supreme Court on April 26, 1976, 28 U.S.C. Sec. 2254, requires the defendant to set out in its answer its position respecting exhaustion of state remedies. Rule 11 of those rules makes the Federal Rules of Civil Procedure aplicable. Rule 12(h), Fed.R.Civ.P., provides that the failure to raise a defense other than subject matter jurisdiction shall constitute a waiver of the defense. The defendant by failing to raise the point below has waived its claim that a

> mixed petition should be dismissed.

Id. n.5. Accordingly, by failing to raise the issue, Respondent has waived it.

Procedural Default

Respondent contends that Petitioner has procedurally defaulted because he failed to raise certain issues on direct appeal. Specifically, Respondent asserts:

> As stated previously, if the claim could have or should have been raised on direct appeal, but was not, a 3.850 petitioner is in procedural default in the state courts. Of course, if a federal habeas petitioner was in procedural default in the state courts, absent a showing of cause and prejudice, the defaulted issues cannot be raised on federal habeas.

Memorandum at 11. Respondent's characterization of the state of the law appears to

be accurate. However, "[w]hen counsel is found to be ineffective, the court will not bind a defendant to a state procedural waiver of possible constitutional defenses, and the cause element of Francis is satisfied." Birt v. Montgomery, 725 F.2d 587, 597 (11th Cir. 1984) (en banc). Petitioner has challenged the effectiveness of his counsel. Additionally, "[t]he guilty plea cannot have been knowing and voluntary . . . if a defendant does not receive reasonably effective assistance of counsel in connection with the decision to plead guilty, because the plea does not then represent an informed choice." Scott v. Wainwright, 698 F.2d 427, 429 (11th Cir. 1983). Petitioner is also challenging the knowing and voluntary nature of his guilty plea. Therefore, it is proper to address the issues presented.

Respondent also appears to be asserting

that Petitioner is "in default" on his ineffective assistance of counsel claim and "[a]ccordingly, all of Petitioner's claims are not properly before a federal habeas court because of Petitioner's defaults under the Sykes-Eagle doctrine. . . " Memorandum at 13.

It is well established that generally under Florida law a claim of ineffective assistance of trial counsel must be raised in a motion filed pursuant to Fla.R.Crim.P. 3.850. See Williams v. State, 438 So.2d 781, 786-87 (Fla. 983). However, Respondent has cited no authority for the proposition that Petitioner is now foreclosed from asserting his ineffective assistance of counsel claim in a Rule 3.850 motion. Cf. Gaines v. State, 172 So.2d 887 (Fla. 2d DCA 1965) (where the claim that Petitioner did not competently and intelligently waive his right to counsel

was denied without prejudice because sufficient facts were not alleged); 28 Fla. Jr. 2d Habeas Corpus and Post Conviction Remedies § 136, at 622 (1981) (which states that a "denial of a motion for postconviction relief based on the insufficiency of the motion is no bar to a subsequent motion"). Accordingly this issue is one of exhaustion rather than procedural default.[2]

[2] Respondent states that "in Maddix v. Wainwright, Case No. 83-809-Civ-J-16, . . . the Court found that although the petitioner was in procedural default, the case 'should be dismissed without prejudice in order for the Petitioner to have an opportunity to exhaust state remedies.'" Memorandum at 11. Respondent has misinterpreted the decision made in the Report and Recommendation entered on April 4, 1984, in that cause. There the petitioner was given the option of abandoning certain issues that he may have waived or presenting the issues to the state courts so that they might rule on the procedural default issue.

Legal Impediment to Trial

On August 5, 1950, Petitioner was adjudicated incompetent in Leon County, Florida, Petition Exhibit A; Horace v. Culver, 111 So.2d 670, 671 (Fla. 1959), and it does not appear that Petitioner's competency has ever been formally restored. Petition Exhibit C, D. As a result, Petitioner contends that because he was previously adjudicated incompetent, "[t]hat presumption stood as a bar to any criminal proceedings against Petitioner, absent restoration of competency." Petition at 5. While it is recognized that the First District Court of Appeal has held that a claim that one's sanity has not been restored must be assertd on direct appeal, see Boone vs. State, 183 So.2d 869, 871 (Fla. 1st DCA); cert. denied, 189 So. 2d 632 (Fla. 1966), and that "[o]nce a plea of guilty has been entered, nonjurisdictional

challenges to the conviction's constitutionality are waived," Scott, 698 F.2d at 429, the legal impediment issue is also being asserted in the context of Petitioner's ineffective assistance of counsel claim. These are "two separate but inextricably related claims." Birt, 725 F.2d at 596. Accordingly, the merits of this assertion shall be reviewed.

It appears that the case law prior to and contemporaneous with Petitioner's conviction in 1966 seems to state that only a presumption of incompetency existed, and that a formal judicial restoration of competency was not necessary. See Yates v. Wainwright, 151 So.2d 832 (Fla. 1962) (per curiam); Clark v. Wainwright, 148 So.2d 273 (Fla. 1963) (per curiam); Dixon v. Cochran, 142 So.2d 5 (Fla.) (per curiam), cert. denied, 371 U.S. 866 (1962); Eason v. State, 421 So. 2d 35, 36 (Fla. 3d DCA 1981)

(per curiam) (which interpreted cases decided prior to Petitoner's conviction). Therefore, this ground for relief is without merit.

Incompetency at Plea and Sentencing

Petitioner next contends that he was denied a hearing required by Pate v. Robinson, 383 U.S. 375 (1966), to determine his competency to stand trial and that he "was incompetent in fact at the time of his 1966 conviction and sentencing." Petition at 6.

First, Petitioner's contention that he did not receive a Pate hearing is not supported by the record. On December 6, 1965, Petitioner appeared before the Honorable John A. H. Murphree who concluded that Petitioner was "mentally competent to understand the nature and gravity of the charges against him and to fairly assist his counsel in the preparation of his

defense." Petition Exhibit B at B 3.

Second, it appears that the state hearing was adequate to determine that Petitoner was in fact competent. Judge Murphree received into evidence the reports of two physicians. Petition Exhibit B at B 3. These reports are attached to the Response as Exhibit I, II. The report of Dr. Henry R. Lyons indicates that he first examined Petitioner on October 6, 1965. Although this examination was inconclusive, he was under the distinct impression that Petitioner was trying to imitate some form of mental illness.

Additionally, he had jail personnel observe Petitioner at least until November 15, 1965. When the jailer asked him to verify certain "critical information," Petitioner did so without hesitation. Dr. Lyons concluded that Petitioner "was competent at the time of his alleged

criminal behavior, that he is competent now and able to cooperate with his attorneys in his defense." Response Exhibit I at 2.

Dr. Josh D. Davis examined Petitioner on October 20, 1965. In addition, jail personnel were interviewed concerning his behavior and a psychological examination was accomplished by Mr. Charles Buchanan on November 1, 1965. Dr. Davis concluded that Petitioner was malingering.

From the record, it appears that these medical reports were adequate to determine that Petitioner was competent to stand trial, because neither report appears to be a cursory observation of Petitioner. In both instances the doctors personally examined him and consulted with jail personnel. In addition, Dr. Davis had a psychological examination performed. These examinations and observations occurred over a period of weeks and both doctors came to

the conclusion that the Petitioner was mentally competent. Based on these reports alone, there appears to be a basis for making an adequate determination as to the Petitioner's competency. See Stinson v. Wainwright, 710 F.2d 743, 545-46 (11th Cir.), cert. denied, 104 S.Ct. 430 (1983); Curry v. Estelle, 531 F.2d 766, 768 (5th Cir. 1976) (per curiam).

Also considered is that Petitioner was found to be incompetent in 1950, Petition Exhibit A, and again in 1978. Second Petition Exhibit E. However, it is noted that in 1959 the Supreme Court of Florida vacated Petitioner's guilty plea and "remanded [him] to the custody of the sheriff of Levy County for further proceedings upon the informations filed against him in accordance with this opinion and the provisions of Section 917.01, Florida Statutes, F.S.A." Horace, 111

So.2d at 672 (footnote omitted). Section 917.01 provides for a hearing to determine a defendant's mental condition. Petitioner was apparently found not to be psychotic and was convicted of Breaking and Entering with Intent to Commit a Misdemeanor on September 26, 1960. See Order entered August 1, 1960, and Judgment and Sentence entered October 21, 1960, attached to the Memorandum as Exhibits. The court in Pedrero v. Wainwright, 590 F.2d 1383, 1388 (5th Cir.) cert. denied, 444 U.S. 943 (1979), concluded "that the bare fact of the defendant's prior commitment to a state institution was insufficient evidence to create a bona fide doubt about his competency to stand trial." Additionally, how proximate the examinations are to a defendant's trial appears to be a factor considered. See Pride v. Estelle, 649 F.2d 324 (5th Cir. 1981) (where the court found

that an expert's evaluation made two and one-half months prior to a petitioner's competency hearing and a medical examination made three months after the trial raised a substantial doubt as to competency although a physician who examined the petitioner three years earlier found him to be competent); Reese v. Wainwright, 600 F.2d 1085, 1094 (5th Cir.) (concluded that a physician's "tentative retrospective diagnosis must be weighed against the consensus of expert opinion prior to [defendant's] trial"), cert. denied, 444 U.S. 983 (1979); Bruce v. Estelle, 536 F.2d 1051 (5th Cir. 1976), cert. denied, 429 U.S. 1053 (1977). Accordingly, Petitioner has not raised a substantial, real, and legitimate doubt as to his competency in 1966. Pride, 649 F.2d at 326. Petitioner's claims that he was denied a Pate hearing and was incompetent

at the time of his guilty plea and sentencing are without merit.

Assistance of Counsel

Several grounds are raised by Petitioner attacking his counsel's effectiveness.

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 52 U.S.L.W. 4565,

4570 (U.S. May 14, 1984). "In a case where the solo theory of defense is one of insanity . . . minimally effective representation must include an investigation into the defendant's past and present medical condition." Mauldin v. Wainwright, 723 F.2d 799, 800 (11th Cir. 1984).

Petitioner notes that the record does not disclose that his counsel learned of his previous adjudication of incompetency and that he may have initially withheld this fact from the court. Petitioner at 7. These contentions are not supported by the record. Petitioner's counsel specifically informed the court that Petitioner has had "a long history of mental disturbance." Petitioner Exhibit B at C3. In addition, the record indicates that the court was specifically told of Petitioner's prior adjudication of incompetency, Petition Exhibit B at C4-5, and it was

represented that Petitioner "was re-examined and found to be competent." Petitioner Exhibit B at C5.

Second, Petitioner indicates that he may not have been present at his competency hearing. Petitioner at 7. This contention is without merit. See Response Exhibit III.

Third, it is asserted that a formal restoration of his competency was required of that "no evidence at all was introduced to rebut the presumption of insanity." Petition at 8. Further, he contends that his counsel waived the Pate hearing. Petition at 8-9. As discussed supra, Florida law did not require a formal restoration of a defendant's competency. Alternatively, on this issue, Petitioner's counsel does not appear to have been "so patently wrong as to transgress some constitutional minimum of competent legal

advice." Rutledge v. Wainwright, 625 F.2d 1200, 1203 (5th Cir. 1980), cert. denied, 450 U.S. 1033 (1981). Additionally, Petitioner received an adequate Pate hearing. Accordingly, Petitioner should be denid relief on this ground.

Fourth, it is argued that his attorney improperly attempted to waive his Pate hearing. Petition at 8. Even if this is correct, see Alexander v. State, 380 So.2d 1188, 1190 (Fla. 5th DCA 1980), the attempted waiver did not prejudice Petitioner because the court made the competency determination despite the attempted waiver.

Finally, Petitioner appears to be contending that his counsel failed to ensure that his plea was knowing and voluntarily made. Petition at 6. This issue will be discussed infra.

Knowing and Voluntary Plea

Law and Record

"Petitioner submits that his plea of guilty was not knowingly and voluntarily entered. At no time was Petitioner advised of the consequences of his plea." Petition at 9. First, "the governing standard as to whether a plea of guilty is voluntary for purposes of the federal Constitution is a question of federal law and not a question of fact subject to the requirements of 28 U.S.C. § 2254(d)." Marshall v. Lonberger, 103 S.Ct. 843, 849 (1983) (citations omitted). Second, "[a] state court may not accept a guilty plea unless the defendant enters it voluntarily and with a complete understanding of the nature of the charge and the consequences of his plea." Frank v. Blackburn, 646 F.2d 873, 882 (5th Cir. 1980) (en banc), deleted in part on rehearing, 646 F.2d 902 (5th Cir.) (en

banc) (per curiam), cert. denied, 454 U.S. 840 (1981); see also Lee v. Hopper, 499 F.2d 456, 462-63 (5th Cir.), cert. denied, 419 U.S. 1053 (1974). "As long as [Petitioner] understood the length of time he might possibly receive, he was fully aware of his plea's consequences." Bradbury v. Wainwright, 658 F.2d 1083, 1087 (5th Cir. 1981), cert. denied, 456 F.2d 992 (1982).

On September 24, 1965, Petitioner was read the information in full. Petition Exhibit B at A-2. Additionally, on January 7, 1966, the following transpired:

> [PETITIONER'S COUNSEL]: The defendant at this time requests leave to withdraw his plea of not guilty and not guilty by reason of insanity and enter a plea of guilty in case No. 6310, your Honor.
>
> THE COURT: Is that what you wish to do, Willie Wesley Horace?
>
> DEFENDANT HORACE: Yes, sir.

> THE COURT: The previous plea of not guilty and not guilty by reason of insanity is withdrawn. Mr. Pierce, you have discussed this matter with the defendant and the nature of the charge and all the necessary elements. Is that correct?
>
> [PETITIONER'S COUNSEL]: Yes, your Honor, and I have had the case thoroughly investigated.

Petition Exhibit B at C2-3.

Accordingly, the record demonstrates that Petitioner was informed of the charges against him. See Stinson, 710 F.2d at 746-48. As discussed, supra, the contention that he was incompetent and therefore unable to understand the charges against him is without merit. Additionally, Petitioner indicates to the trial court that he wanted to plead guilty. Cf. Blackledge v. Allison, 431 U.S. 63, 74 (1977) (which stated that "[s]olemn declarations in open court carry a strong presumption of verity"). However, since

the record is deficient because there is no indication that Petitioner was advised of the consequences of his plea, an evidentiary hearing on this issue was required. Respondent insists that Petitioner should be barred from presenting evidence on this issue.

Laches and Rule 9(a)

Respondent asserts that Petitioner should not prevail on his claim that he did not know of the consequences of his plea because of laches and Rule 9(a), Rules Governing Section 2254 Cases in the United States District Courts. See Memorandum at 21-23. In order to prevail, Respondent must show actual prejudice was caused by Petitioner's delay. Hill v. Linahan, 697 F.2d 1032, 1035-36 (11th Cir. 1983) (per curiam). Respondent has filed several affidavits which tend to demonstrate that none of the persons who may have had

knowledge pertaining to Petitioner's guilty plea have an adequate recollection of it. See Affidavits filed May 16-17, 1984; Respondent's Exhibit 1 filed at the June 7, 1984, evidentiary hearing. Of concern is that Petitioner first asserted his claim that he was not advised of the consequences of his plea in federal court on October 21, 1981, less than three years ago. See Petition at 9. That Petitioner did not know the consequences of his plea was argued in the state courts in a motion filed pursuant to Fla. R. Crim. P. 3.840 prepared in December, 1979. See Rule 3.850 motion filed with Response to Order on March 23, 1983. The First District Court of Appeal affirmed the trial court's denial of the Rule 3.850 motion on September 16, 1980. See Exhibits filed with Response to Order on March 10, 1983. Accordingly, even after Petitioner had presented his claim

that he did not know the consequences of his plea to the state courts, he waited over a year before he raised it in the instant Petition. Although "it may be assumed that the [affiants] would have had a better chance of remembering the facts in" October, 1981, when Petitioner filed his Petition in federal court than in 1984 when the evidentiary hearing was held, Brown v. Maggio, 730 F.2d 293, 296 (5th Cir. 1984) (per curiam), it may also be assumed that they would have had a better chance of remembering if he had filed the instant Petition soon after his January, 1966 conviction instead of waiting over fifteen and one-half years to assert the claim in federal court and almost fourteen years to argue it in a Rule 3.850 motion before the state courts. Courts have dismissed petitions when petitioners have waited even shorter periods to file. See

Moore v. Smith, 694 F.2d 115 (6th Cir. 1982), cert. denied, 103 S. Ct. 1442 (1983) (eleven year delay); Cotton v. Mabry, 674 F.2d 701 (8th Cir.), cert. denied, 459 U.S. 1015 (1982) (ten year delay); Mayola v. Alabama, 623 F.2d 992 (5th Cir. 1980), cert. denied, 451 U.S. 913 (1981) (eleven year delay in bringing the issue before the state court).

Despite the above-noted concern, it appears that it would not be inaapropriate to conclude that Respondent has shown that prejudice has been caused by Petitioner, because he is responsible for the vast majority of the delay. Clearly, Respondent would not have been prejudiced if Petitioner had filed the instant Petition within a reasonable period of time.

At the evidentiary hearing Petitioner asserted that he did not question his 1966 conviction while he was in prison until

1973 when a friend told him that he should take his case back to court. Additionally, prior to this time he testified that he did not know that he "could file on these things." Even after he discussed his case with his friend, he decided that he did not want to seek relief in the Florida courts at that time because he thought that to do so would "kill" his chance of getting out on parole. Once released in 1974, Petitioner stated that he tried to obtain an attorney and he thought that there was a difference between a prisoner seeking relief in the courts and someone who had been released.

Having considered Petitioner's testimony, the Court does not consider credible his assertion that he was unaware of judicial redress until 1973 when a friend so advised him. Petitioner's own case that was decided in 1959 demonstrates

that he had in the past successfully sought such relief. Accordingly, "he knew or should have know that he could seek collateral relief." Brown, 730 F.2d at 296. Petitioner should be denied relief because Respondent has been prejudiced by Petitioner's unexcusable delay.

Merits of Petitioner's Consequences Assertion

Even if Petitioner's claim was not barred by Rule 9(a), it does not appear that he would be entitled to habeas relief. Petitioner testified that no one told him that he could receive a life sentence. In fact, Petitioner recalled that Mr. Pierce informed him that if he would plead guilty he would go to the hospital for six months for treatment.

When he was finally sentenced, he did not think anything about it, because he just wanted to get away. Initially, it did

not dawn on him that he had received a life sentence.

Petitioner stated that at that time he realized there were offenses punishable by a life sentence, but he did not know he was charged with such an offense. Although professing that he now sufficiently recalls the conversations with his attorneys pertaining to significant matters, so as to be able to state that they never told him the consequences of his plea, it is also noted that Petitioner admitted that during this time period he, on occasion "drifted in [and] drifted out." Notwithstanding this fact and the statements of others that he had mental problems, he always thought that he was all right.

The evidentiary hearing was not the first time that Petitioner has raised the issue of his mental competency. On page two of the habeas corpus petition that

Petitioner filed in the Union County Circuit Court, he indicated that he did not "have sufficient ability to consult with his attorney with a factual understanding of the proceeding against him at that time on January 7, 1966 at the Alachua County Criminal Courthouse." See Exhibits filed March 14, 1983, with Supplemental Response to Order. On page ten of his brief before the First District Court of Appeal, he claimed that his guilty plea was invalid because he was mentally incompetent. On page twenty-one he also claims that he "had a blocking of thought" and was suffering from various mental illnesses. See Exhibits filed March 23, 1983, with Response to Order.

In his Rule 3.850 motion memorandum of law on page seven, he asserts that his guilty plea was invalid because he was not competent. See Exhibits filed March 23,

1983, with Response to Order. On page sixteen of his original petition for writ of habeas corpus filed in this cause on September 6, 1979, Petitioner also asserts that he was mentally ill. Except for the brief filed before the First District Court of Appeal, all of these representations appear to have been under oath.

The Court finds incredible Petitioner's testimony that he now recalls the contents of conversations occurring over eighteen years ago in view of his previous claims surrounding his mental state during the same time period. Petitioner's recollection at the evidentiary hearing included, perhaps for the first time, that not only was he not advised of the potential life exposure but rather was specifically told he was to receive six months in the hospital. Based on the foregoing, as well as the Petitioner's

demeanor and possible bias or interest in the case, the Court discredits his testimony. Although the record demonstrates that Petitioner was competent during this period, his claims of incompetence at least indirectly conflict with his assertion that he can now recall that he was not informed about the consequences of his plea. Accordingly, he has failed to demonstrate that he is entitled to habeas relief.

Parole Revocation Hearing

Petitioner claims that he was denied due process and a fair hearing because his parole was revoked while he was not mentally competent. Second Petition at 1. It is contended that "[w]hile an incompetent may be present physically, his lack of mental wherewithal results in a deprivation of a meaningful opportunity to defend himself." Second Petition at 3.

Morrissey v. Brewer, 408 U.S. 471, 480 (1972), noted "that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. . . . Supervision is not directly by the court but by an administrative agency. . . ." Among the due process rights that a parolee is entitled to at a revocation hearing include "the opportunity to be heard in person." Id. at 489. While mental incompetency may not be an adequate defense for a parole violation, Steinberg v. Police Court of Albany, New York, 610 F.2d 449 (6th Cir. 1979), the question arises as to whether Morrissey requires that a parolee be mentally competent at his revocation hearing. This issue was expressly left undecided in Knight v. Estelle, 501 F.2d 963, 965 (5th Cir. 1974) cert. denied, 421

U.S. 1000 (1975), and at least one court has held that a parolee's mental competency is not a condition precedent to holding a parole revocation proceeding. People ex rel. Newcomb v. Metz, 64 A.D.2d 219, 409 N.Y.S.2d 554 (N.Y. App. Div. 1978). If a parolee is not mentally, competent, it is not apparent how he may utilize his due process rights which he is entitled to. Not only does it appear that an incompetent parolee would be unable to be heard in person, but he also would not be able to assist his attorney in his defense. See Dusky v. United States, 362 U.S. 402 (1960) (per curiam) (which espoused the test for a finding of competency to stand trial).

In People v. Martin, 61 Mich. App. 102, 232 N.W.2d 191 (Mich. Ct. App. 1975), the court concluded that it would be improper to hold a probation revocation proceeding while the defendant was incompetent. Since

it has been held that the due process rights of an individual facing a probation revocation are the same as that for a person facing a revocation of parole, see Gagnon v. Scarpelli, 411 U.S. 778 (1973), it would follow that if Martin is correct parole should not be revoked while the parolee is incompetent. This requirement would not mean that the state would necessarily be required to release an incompetent parolee from "custody" even if there is sufficient cause to believe that a parole violation has occurred. "If found incompetent, the revocation hearing will be postponed, but the offender will probably remain incarcerated in either a prison or mental institution." N. Cohen & J. Gobert, The Law of Probation and Parole, §9.43, at 488 (1983). However, the issue as to whether an individual must be competent at his parole revocation hearing need not be

decided because Petitioner has not demonstrated a substantial, real, and legitimate doubt as to his competency. Pride, 649 F.2d at 326.

On February 10, 1978, a United States District Court determined that Petitioner was not competent to stand trial and that there was "no substantial likelihood that [he would] regain his competency within the foreseeable future." Second Petition Exhibit E at 2. On April 6, 1979, the Florida Probation and Parole Commission (hereinafter FPPC) conducted a hearing to determine whether Petitioner's parole should be revoked. At the hearing Dr. Jose Gonzalez testified he was of the view that Petitioner was able to assist his counsel in his defense and did not have a mental disorder. See Transcript filed November 13, 1980 (hereinafter T.) at 47-48; see also T. at 45-46. Mr. Mike Bukson

testified that Petitioner had an anti-social personality. T. at 50-55.

On April 11, 1979, Petitioner's parole was revoked. No finding was made by the FPPC that Petitioner was competent at his revocation hearing. See Revocation of Parole attached to the Motion to Dismiss filed on January 14, 1980. Nor does it seem appropriate that the FPPC should do so because the Florida Constitution provides that "[c]ircuit courts . . . have exclusive original jurisdiction . . . [in] the determination of incompetency." Fla. Const. art. V, §20(c)(3).

Upon review of the record, it does not appear that Petitioner has shown a substantial, real and legitimate doubt as to his competency at his parole revocation hearing. Although fourteen months prior to that hearing a federal court determined that Petitioner was incompetent and not

likely to be competent in the foreseeable future, Dr. Gonzalez found Petitioner not to be suffering from a mental disorder. As discussed supra, the contemporaneousness of the medical examinations appears to be a factor considered. Furthermore, the record supports a finding that Petitioner had a "reasonable degree of rational understanding," Dusky, 362 U.S. at 402, because Petitioner specifically denied that he had violated his parole, T. at 5, and complained about his attorney to the FPPC. T. at 26.

Recommendation

The Motion for Judgment on the Pleadings filed on November 23, 1982, and construed as a motion for summary judgment by Order entered on May 4, 1984, should be denied. The Motion for Summary Judgment filed on May 9, 1984, should be granted, except for the claim that the plea of

guilty was not knowingly and voluntarily made, upon which evidence was taken. As to this last issue, as indicated in the foregoing discussion, the Respondent should prevail. Accordingly, it is recommended that the Amended Petition for Habeas Corpus Relief and the Second Amended Petition for Habeas Corpus Relief filed on October 21, 1981, and January 22, 1982, respectively, be dismissed with prejudice.

ENTERED at Jacksonville, Florida, this 11th day of June, 1984.

Howard T. Snyder
HOWARD T. SNYDER
United States Magistrate

Copies to:

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